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IN THE

Supreme Court of the United States

October Term, 1965

Number 457

JAMES E. IVEY, STEPHENSON ALEXANDER PRICE, CLARENCE HOPE NEWLIN, JR. and THERON ROYCE LOCKE,

Petitioners,

versus

UNITED STATES OF AMERICA,

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

JOSEPH G. BRAMBERG
Attorney for Petitioners
c/o Walter R. Brown Building
Atlanta 3, Georgia

IN THE

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JAMES E. IVEY, STEPHENSON ALEXANDER PRICE, CLARENCE HOPE NEWLIN, JR. and THERON ROYCE LOCKE;

Petitioners,

versus

UNITED STATES OF AMERICA,

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Now comes James E. Ivey, Stephenson Alexander Price, Clarence Hope Newlin, Jr. and Theron Royce Locke, petitioners in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioners James E. Ivey, Stephenson Alexander Price, Clarence Hope Newlin, Jr. and Theron Royce Locke were

indicted for the offense of conspiracy to violate United States Code, Title 18, Section 371, and Section 2314; it was set out in said indictment that the defendant did wrongfully, wilfully, and unlawfully transport into Interstate Commerce, goods, wares, and merchandise of the value of more than five thousand ($5,000) dollars, to wit: eggs, which said eggs, as the defendants well knew, had been stolen, converted, and taken by fraud; and also there were eight (8) overt acts set out in said indictment which were the matters and things that were alleged to have been committed by the said petitioners. All of the defendants were placed on trial, and the government presented evidence and all of said defendants were convicted on said charge.

It was the contentions of the government that all of the defendants had entered into a conspiracy to violate the code sections above referred to as set out in said code sections of the United States Criminal Code; and that in furtherance of the scheme, the defendants did open a bank account for the purpose of drawing drafts and depositing money, which said bank account was opened up by Ivey under the name of Atlantic Export Company, said Ivey giving his name and address and his purpose for opening up said bank account whereby he could draw drafts for payment of eggs purchased from various people throughout the United States. A portion of the evidence and testimony by the Government witness Clifford Brooks, who rented an office to the defendant Ivey and also the government, E. H. Furcron, and also the government witness, E. H. Furcon, testified concerning the bank account, etc.

The government also produced various witnesses who sought to identify one or the other of the petitioners as

persons who participated in the purchase, transportation and buying the alleged eggs from some of the government witnesses, and some of the said government witnesses were present at the time of the particular transaction alleged and described in the overt acts set out in said indictment. The government produced other similar transactions although not alleged in said indictment as overt acts, to prejudice the jury's mind against the defendants. The government witnesses on many occasions during the said trial was confused and identified some defendants as other defendants, and it became a close jury question as to which of the witnesses the jury would believe.

The government witness, Clifford Brooks, R-22-24, testified that Ivey gave his correct name and his correct address and his reason for opening up the bank account, also government witness, Thomas Noell, Clerk of the Superior Court of Oglethorpe County, Georgia, R-32-33 and 34, fixed up the trade name registration for Mr. Ivey, giving his name, the ownership and the address of the owner as the Atlantic Export Company. The government witness, E. H. Furcron, the bank official, testified the reasons Ivey opened up the bank account and why he was using drafts and how said drafts could be honored. Furcron further testified that there were many checks and drafts honored on said account and that when Ivey was called concerning a draft, if there was not sufficient money on deposit, he would send the cash to the deposit of said account, where said draft would be honored.

During the course of this trial the Government saw fit to introduce evidence of similar transactions (See R-265, 266 and 267); and that Mr. Walter Fincher, one of the Attorneys in the Case, R-266, made the following objec-

tion along with other attorneys who adopted the same. Said objections (R-266) is as follows:

"Now, if your Honor please, we object to any testimony from this witness Corbett in relation to a draft presented for payment of another purported shipment of eggs that the District Attorney is introducing for the purpose of showing some element of his case against these defendants. I object to any testimony relating to distinct and separate transactions — for Mr. Price — by this witness that is about to testify in relation to a draft that payment was stopped on or he didn't get his money on. I object to it as immaterial and irrelevant and highly prejudicial to the defendant Price."

THE COURT:

Well, I don't think it is necessary to excuse the jury. We have already argued this once. I'm ready to rule on it.

Members of the Jury, the evidence being offered at this time in respect to a different draft or check and a different and distinct purchase or sale transaction is being admitted in evidence solely for what bearing it may have, if any, upon establishing or indicating the knowledge and the intention of any of the defendants on trial. They are not being tried for this $2880 check or draft, but the evidence is admissible for the purpose of indicating knowledge and intention and modus operandi or method of operation on the part of the defendant or defendants, if the jury finds that it has potency or relevancy along that line.

Very well."

The United States Court of Appeals for the Fifth Circuit, in affirming the judgment of conviction, held that

(1) although not in their decision that it was not in error to allow this testimony of similar transactions to go before the jury; (2) that it was not a plain error; (3) that there was overwhelming evidence that warranted their conviction by the jury, although the evidence was not sufficient to show that the defendants had knowledge that the moving merchandise in Interstate Commerce was stolen by fraud and deceit.

A petition for rehearing was filed by petitioners, and denied by the United States Court of Appeals.

JURISDICTION

(a) The judgment of the Court of Appeals was entered on June 1, 1965. A petition for rehearing was denied on July 14, 1965. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule 11 of the Rules of Practice and Procedure.

(b) This petition for certiorari is being filed in this case within 30 days from the date of the judgment denying the petition for rehearing.

(c) The nature of the case and the rulings of the court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:

The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

THE QUESTIONS PRESENTED

1. Where the government introduces testimony of similar transactions not plead in the indictment tending to improve or boost their case, is this an error of law and is this a violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, namely, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Does the trial in such an instance violate Article VI of the United States Constitution (trial in criminal cases and rights of a defendant . . . the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed . . .

3. Can the instructions given by the court to the jury erase from the minds of the jury this prejudicial evidence whereby the jury can be said to be impartial and not prejudiced against the defendant.

APPENDIX

Petitioners herein append to this petition a copy of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

JOSEPH G. BRAMBERG
Attorney for Petitioners
c/o Walter R. Brown Building
Atlanta 3, Georgia

IN THE

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 21772

JAMES E. IVEY, STEPHENSON ALEXANDER PRICE, CLARENCE HOPE NEWLIN, JR., and THERON ROYCE LOCKE,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(June 1, 1965.)

Before TUTTLE, Chief Judge, EDGERTON,*, and SMITH,** Circuit Judges.

PER CURIAM: In this alleged conspiracy to "Transport in interstate . . . commerce any goods . . . knowing the same to have been . . . taken by fraud," no substantial argument can be made on behalf of any appellant other than Clarence H. Newlin, Jr. There was overwhelming evidence that warrants their conviction by the jury.

*Senior Circuit Judge of the D.C. Circuit, sitting by designation.
**Of the Third Circuit, sitting by designation.

As to Newlin, Jr., it is clear from the record that he had sufficient connection with the setting up of the means through which the fraud was perpetrated and the acquisition of the property which became the subject of interstate commerce to warrant the submission to the jury of the issue of his knowledge and the participation in the conspiracy.

The judgments are AFFIRMED.

(588) — Tuttle

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,772

JAMES E. IVEY, STEPHENSON ALEXANDER PRICE, CLARENCE HOPE NEWLIN, JR., and THERON ROYCE LOCKE,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(JULY 14, 1965)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, EDGERTON* and SMITH**, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

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*Senior Circuit Judge of the D.C. Circuit, sitting by designation.
**Of the Third Circuit, sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 457

JAMES E. IVEY, STEPHENSON ALEXANDER PRICE, CLARENCE HOPE NEWLIN, JR. and THERON ROYCE LOCKE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 346 F. 2d 157.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1965. A petition for rehearing was denied on July 14, 1965. The petition for a writ of certiorari

was filed on August 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, at a trial for conspiracy to transport in interstate commerce goods taken by fraud, it was error to admit, as bearing on intent, evidence of similar transactions.

STATEMENT

Petitioners were convicted in the United States District Court for the Middle District of Georgia of conspiring to transport in interstate commerce goods of a value of more than $5,000 which they knew had been taken by fraud. See 18 U.S.C. 371, 2314. Clarence Newlin, Jr. was sentenced to imprisonment for two years, and the others to imprisonment for two and one-half years. The court of appeals affirmed the convictions *per curiam*.

1. The evidence showed that on October 3, 1962, petitioner Ivey opened a bank account in the name of Atlantic Export Company at the Commercial Bank in Crawford, Georgia with a $10,000 cash deposit. Ivey was accompanied by Clarence Newlin, Jr. Ivey explained to the banker that he was buying eggs for export, and that, since he wanted to have an opportunity to inspect the eggs before paying for them, he did not want any drafts charged to the Atlantic Export account.[1] For this reason, when drafts for eggs

[1] In contrast to checks, a bank does not charge a draft to a customer's account until he approves it (R. 127).

arrived at the Commercial Bank, the bank was to notify Ivey who would bring over a check on the Atlantic Export account in payment of the draft (R. 35-37, 46). From October to November 10, 1962, about 20 drafts were handled in this fashion (R. 39, 45-46). The company's bank balance was $19,383.44 on November 14 (R. 109).

On November 14 and 15, Newlin, Jr., using the name Smith, and identifying himself as a buyer for Atlantic Export, arranged for the purchase of two loads of eggs from a Mr. Kottler in Cleveland (R. 51-64). He gave Kottler two drafts totalling $17,550 drawn by Atlantic Export on the Commercial Bank of Crawford (R. 60). The eggs were shipped out on the 15th and 16th (R. 63-64), but the drafts were never paid (R. 66-67). On November 19, before the arrival of Kottler's drafts, petitioner Price, using the name Pierce, withdrew $17,550 from the Atlantic Export account. He said he was going to deliver the cash to Cleveland to take up some drafts which were out (R. 111-114).[2] No additional deposits were made in the Atlantic Export account, except one check on which payment was stopped (R. 114).

The two loads of Kottler's eggs were driven to New Jersey where they were loaded on to another truck and sent south (R. 134-142, 152, 156, 184). The

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[2] After Kottler's drafts were not paid, he received a telephone call from Smith and also spoke with "Pierce," who said the bank had insufficient funds but that they would bring the cash. They subsequently called back to say that they could not make connections. Kottler immediately reported the matter to the F.B.I. (R. 67-68).

driver of the first load identified Ivey, Price and Newlin, Jr., as the men who met him in New Jersey and directed the reloading of the eggs (R. 138-139). The eggs were delivered to the premises of one Cottone in Miami, where the drivers were paid by petitioner Locke using the name Smith (R. 156-157, 161-162).

About November 16, Newlin, Sr. had called Cottone to see whether he would purchase eggs which had been refused as an export order (R. 194-195). Cottone said he could not pay for the eggs until they were sold (R. 198-199). Newlin and Smith (petitioner Locke) came to Miami (R. 197-199) and Cottone gave Locke $400 in advance to pay the drivers (R. 200). Cottone collected $11,000 for the eggs (R. 224).

2. The government also produced evidence of similar transactions. (1) Newlin, Sr. and petitioner Locke (using the name Smith), as representatives of Ivey and Atlantic Export, arranged for the purchase of eggs from one Korbitz in Maine in October 1962. Checks for two shipments in October were paid, but checks given for two additional purchases in November 1962 did not clear and the eggs were never paid for (R. 257-263). (2) Newlin, Sr. and Locke purchased eggs from a processor and paid for them in drafts of Atlantic Export which were honored in October and November 1962. However, a draft in the amount of $1,560 for a purchase made on November 17, 1962, was never honored (R. 271-277). (3) Newlin, Sr., Locke, and Ivey made a purchase of frozen eggs from a man in Maine in October 1962,

giving him a draft which was not paid (R. 263-271). (4) An order placed by telephone with a North Carolina firm in November 1962 was received by Locke and Ivey, but the draft signed by Ivey for $2,940 was never paid (R. 281-285).

When petitioners objected to the admission of evidence with respect to one of these transactions, the judge instructed the jury that the evidence was being received only "for the purpose of indicating knowledge and intention and modus operandi or method of operation on the part of the defendant or defendants, if the jury finds that it has potency or relevancy along that line" (R. 267). In his final charge, the judge said (R. 300):

> I charge you that under the law evidence may be received of separate transactions distinct from those charged in the indictment if such separate transactions are similar in nature to those charged in the indictment and if they were committed by the same persons, the defendants, at or about the same time as the transactions charged in the indictment. Such evidence is admissible not for the purpose of convicting a defendant for a crime with which he is not charged; that would not be permissible, but for the limited purpose of determining his intent with respect to the matter charged in the indictment.

ARGUMENT

Evidence of similar acts, occurring close in point of time to the acts charged, was properly admitted as bearing on intent and mode of operation. *Nye &*

Nissen v. *United States*, 336 U.S. 613, 618. There is thus no issue warranting review by this Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

SEPTEMBER 1965

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